No. 87-9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

McDONNELL DOUGLAS CORPORATION,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF STATE OF CALIFORNIA, and BRYAN RAYNOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

In *IBEW v. Hechler*, 107 S. Ct. 2161 (1987), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), this Court held that federal labor law will preempt a state common law claim which is "inextricably intertwined with consideration of the terms of the labor contract." The question presented here is: whether this principle of federal preemption also extends to the remedial phase of a state administrative proceeding, or may a state administrative agency itself analyze and apply a collective bargaining agreement even though that agreement contains a comprehensive grievance and arbitration provison?

This question arises in the context of a proceeding to remedy a discharge found to be unlawful under California's workers' compensation statute. When determining the appropriate remedy, the Workers' Compensation Judge ("WCJ") initially construed California Labor Code Section 132a to provide only a "make-whole" remedy which ensured that the wronged employee did not receive a windfall benefit at the expense of fellow employees with greater collectively bargained seniority. Subsequently, upon remand, the WCJ himself analyzed and interpreted the labor contract's seniority provisions, and on the basis of this analysis alone, ordered just such a seniority "inversion." The WCJ should *not* have interpreted the collective bargaining agreement, but should have deferred to the contract's grievance and arbitration procedure, because the same important federal labor law principles which mandated this Court's holdings in *Hechler* and *Allis-Chalmers* also preclude a state administrative agency from usurping the arbitrator's

role as the primary interpreter of the terms of the collective bargaining agreement.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner McDonnell Douglas Corporation and the respondents, the Workers' Compensation Appeals Board of the State of California and Bryan Raynor.

Petitioner McDonnell Douglas Corporation has no parent company. Pursuant to Rule 28.1, McDonnell Douglas' subsidiaries and affiliates are listed in the Appendix to this petition at page A46.

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The petitioner, McDonnell Douglas Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Workers' Compensation Appeals Board of the State of California entered in this proceeding on August 11, 1986. The Supreme Court of California denied a petition for review on March 25, 1987.

OPINIONS BELOW

None of the opinions in this matter has been officially reported. The Workers' Compensation Judge's ("WCJ") initial opinion, finding, and order are reprinted here in the appendix to this petition at pages A1-A4. The WCJ's report and recommendation of reconsideration to the Workers' Compensation Ap-

peals Board of the State of California ("WCAB") is reprinted at pages A5 - A9 and the WCAB's opinion and order granting reconsideration is reprinted at pages A10 - A12. The WCJ's minutes of further hearing, supplemental findings, award, and opinion are reprinted at pages A13 - A31. The WCJ's report recommending denial of McDonnell Douglas' petition of reconsideration of the supplemental award, and the WCAB's opinion and order denying the petition, are reprinted at pages A32 - A41.

The denial by the California Court of Appeal, Second Appellate District, Division Five, of McDonnell Douglas' petition for writ of review is reprinted at page A42. The California Supreme Court's order denying review is reprinted at page A43.

JURISDICTION

On August 11, 1986, the WCAB denied McDonnell Douglas' motion to reconsider the supplemental opinion and order of the WCJ. On January 26, 1987, the California Court of Appeal denied McDonnell Douglas' petition for a writ of review of the WCAB's decision. Subsequently, on March 25, 1987, the California Supreme Court also denied McDonnell Douglas' petition for review. McDonnell Douglas invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

From January 2, 1980 until March 23, 1981, Petitioner McDonnell Douglas employed Respondent Bryan Raynor as a "J6J3 manufacturing assistant" at

its Long Beach, California facility.[1] A collective bargaining agreement between McDonnell Douglas and Local 148, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") governed the terms and conditions of Raynor's employment. This collective bargaining agreement provided for the resolution of all disputes over the interpretation or application of any of the terms of the contract through a prescribed grievance and arbitration procedure. The agreement also included a provision that required McDonnell Douglas to lay off employees in strict inverse order of seniority. The agreement further stated that laid-off employees with less than two years' accrued seniority lose all rights of recall to employment with McDonnell Douglas after two continuous years of layoff.

Effective March 23, 1981, McDonnell Douglas terminated Raynor for being absent from work without leave. The California Court of Appeal, reversing the WCAB, subsequently determined that this absence was due to an occupational injury and that the termination violated California Labor Code Section 132a.[2] The

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[1] The parties stipulated to this fact before the WCJ. Each of the facts asserted in this petition was either stipulated to or found judicially by the WCJ.

[2] McDonnell Douglas does not now dispute this determination. Cal. Lab. Code § 132a states in pertinent part:

> Any employer who discharges . . . any employee because he or she has filed . . . an application [for workers' compensation] . . . is guilty of a misdemeanor . . . . Any employee shall also be entitled to reinstatement and such reimbursement for lost wages and work benefits caused by the acts of the employer.

The full text of the relevant provisions of the statute are

WCAB then referred the matter to WCJ Gray to determine McDonnell Douglas' liability to Raynor under Section 132a.

Undisputed evidence presented in an evidentiary hearing before the WCJ established that, between 1980 and 1982, McDonnell Douglas experienced severe economic difficulties and had to lay off over ten thousand employees at its Long Beach facility. As required by the collective bargaining agreement, all layoffs of bargaining unit employees were made in strict inverse order of seniority. Undisputed testimony also established that, pursuant to the seniority provisions of the collective bargaining agreement, Raynor would have been laid off on August 7, 1981 had he then been working for McDonnell Douglas, and that he would have lost forever all rights of recall to employment with McDonnell Douglas on August 7, 1983, without ever having been recalled.[3]

McDonnell Douglas argued to the WCJ that Section 132a's requirement of reinstatement and full backpay mandated a "make-whole" remedy which required an employer to restore a wronged employee only to the position he or she would have enjoyed absent the discrimination. This matter presented a question of

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reprinted in the appendix to this petition at pages A44 - A45.

[3] Raynor was temporarily totally disabled by the occupational injury from March 22, 1981 until November 10, 1981. Because at the date of his layoff Raynor was disabled due to an occupational injury, McDonnell Douglas would not have actually laid him off until November 11, 1981, when he was fit to return to work. However, pursuant to the collective bargaining agreement, the effective layoff date was the seniority-determined date of August 7, 1981, and this date established Raynor's recall rights.

statutory interpretation of first impression under California Labor Code Section 132a. In support of its position, McDonnell Douglas argued that the term "reinstatement" in Section 132a should be interpreted in a manner consistent with the uniform interpretation given the term under the National Labor Relations Act, Title VII of the Civil Rights of 1964, and the California Fair Employment and Housing Act. Each of these statutes has been interpreted not to require reinstatement when the employee would have been terminated in any event for reasons independent of the discrimination.

McDonnell Douglas also argued to the WCJ that, if he should interpret Section 132a to require McDonnell Douglas to reinstate Raynor without regard for collectively bargained seniority, a direct conflict would then arise between McDonnell Douglas' "obligation" under state law to reinstate Raynor and its federally-enforceable obligation to follow the seniority provisions of the collective bargaining agreement. McDonnell Douglas further argued that, under controlling principles of federal law developed by this Court, the doctrine of federal preemption precluded the application of Section 132a in a manner which conflicted with collectively bargained seniority because California has no overriding interest in conferring a "windfall" upon Raynor at the expense of fellow employees with greater seniority.

In fact, in his initial decision, the WCJ did not reach the federal law question because he interpreted Section 132a to restrict Raynor to a make-whole remedy defined by his collectively bargained seniority rights. *See* A1 - A2.

Subsequently, Raynor filed a petition for reconsideration with the WCAB asserting, for the first time, that, under certain "exceptional provisions" of the collective bargaining agreement, McDonnell Douglas was required to reinstate him with backpay. McDonnell Douglas opposed the petition, arguing that the preemption principles of federal labor law required the WCJ to limit Section 132a to a make-whole remedy in accordance with the labor contract's seniority and other provisions. Simply ignoring McDonnell Douglas' federal preemption argument, the WCAB granted Raynor's petition, rescinded the WCJ's prior order, and returned "the case to the trial level for further hearing regarding the collective bargaining agreement." A11.[4]

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[4] Raynor's petition for reconsideration did not deny the WCJ's finding that Section 132a limited a wronged employee to a "make-whole" remedy. Nor at any time during these proceedings did either the WCJ or the WCAB contradict this finding.

The WCAB also granted reconsideration to review Raynor's contention that the collective bargaining agreement had expired in October 1983, and that no agreement existed until the settlement of an ensuing strike in February 1984. A10. Neither the WCJ nor the WCAB subsequently relied on this contention in their supplemental findings. In fact, Raynor's recall rights expired in August 1983 during the term of the agreement, and no laid-off J6J3 employees were recalled during the hiatus between the expiration of one contract and the execution of a successor contract. *See* A20. In any event, seniority provisions survive the expiration of a collective bargaining agreement. *See NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 980 (8th Cir. 1967).

McDonnell Douglas filed its opposition to Raynor's petition for reconsideration on December 26, 1984. The WCAB rendered its decision on February 1, 1985. This Court decided *Allis-Chalmers Corp. v. Lueck* on April 16, 1985.

The WCJ then conducted a further evidentiary hearing. *See* A13 - A25. McDonnell Douglas again raised the issue of federal labor law preemption and argued to the WCJ that only an arbitrator, not the WCJ, had jurisdiction to interpret the contract. Indeed, McDonnell Douglas offered to waive the grievance procedure's time limits to permit Raynor to make use of the contract's arbitration provisions. Nevertheless, in a supplemental award, WCJ Gray himself analyzed and interpreted the contract to resolve the disputes between the parties over the applicability of the contract's "exceptional provisions," and, in direct conflict with uncontradicted testimony on "custom and practice" from senior company and union officers responsible on a day-to-day basis for implementing the terms of the collective bargaining agreement, the WCJ ordered Raynor's reinstatement to the active payroll with full backpay. A27.

In a petition for reconsideration to the WCAB, McDonnell Douglas argued that the WCJ had exceeded his authority in analyzing the labor contract contrary to federal law, and, in any event, the evidence presented did not support the WCJ's analysis of the contract. The WCAB denied McDonnell Douglas' petition.[5] The California Court of Appeal, Second

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[5] As an alternative holding to the denial of McDonnell Douglas' petition for reconsideration, the WCAB noted that the reconsideration petition was initially not verified. A41. This alternative holding is not an independent state ground supporting the judgment because, as this Court has recently concluded, a failure to comply with a state procedural rule does *not* waive a defense based on federal labor law preemption. *See International Longshoremen's Association v. Davis*, 106 S. Ct. 1904, 1913 (1986).

Appellate District, Division Five, subsequently denied McDonnell Douglas' petition for a writ of review. A42. On March 25, 1987, the California Supreme Court similarly denied review. A43.

REASON FOR GRANTING THE WRIT

The principles enunciated by this Court in *Allis-Chalmers* and *Hechler* must be extended to state administrative remedial proceedings to the extent that the state agency's ultimate decision is "inextricably intertwined" with the interpretation and application of seniority or other provisions of a collective bargaining agreement which contains a comprehensive grievance and arbitration provision.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and again more recently in *IBEW v. Hechler*, 107 S. Ct. 2161, 55 U.S.L.W. 4694 (1987), this Court determined the role that federal preemption should play when a state court considers a substantive state-law cause of action which is alleged to conflict with the terms of a collective bargaining agreement. Barely one month ago, this Court unanimously reaffirmed its earlier conclusion that the federal law of labor contracts preempts a state-law claim which is "inextricably intertwined with consideration of the terms of the labor contract." *Hechler*, 55 U.S.L.W. at 4696 (quoting

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In any event, McDonnell Douglas cured the defect promptly as allowed by California law. *See United Farm Workers of America v. ALRB*, 37 Cal. 3d 912, 315, 694 P.2d 138, 210 Cal. Rptr. 453, 455 (1983); Hanna, *California Law of Employee Injuries* § 7.02[3] at 7-14 (1986).

Allis-Chalmers, 471 U.S. at 213). Thus, this Court held, federal labor law will determine the outcome "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Hechler*, 55 U.S.L.W. at 4695 (quoting *Allis-Chalmers*, 471 U.S. at 220).

Even more recently, this Court, in *Perry v. Thomas*, No. 86-566 (U.S. June 15, 1987) held that an employee's agreement to arbitrate preempts the remedial procedures of California Labor Code Section 229. Although, in *Perry*, this Court based its decision upon Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, federal policy under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, is no less favorable to arbitration. *Compare Allis-Chalmers*, 471 U.S. at 220 *with Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) (FAA establishes "federal policy favoring arbitration"). Thus, here, as in *Perry*, federal law supremacy requires the pre-emption of state-created remedial provisions which conflict with the strong federal policy requiring that agreements containing arbitration clauses be interpreted, in the first instance, by an arbitrator in accordance with those provisions. *See also Shearson/American Express Inc. v. McMahon*, 55 U.S.L.W. 4757, 4762-63 (U.S. June 8, 1987) (enforcing arbitration agreement to resolve claims arising under Securities Exchange Act and RICO); *Vaca v. Sipes*, 386 U.S. 171, 184 (1967) ("Since the employee's claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced.").

This case presents this issue in the context of the enforcement by a state administrative agency of the remedial provisions of a state statute prohibiting retaliatory discharge for filing a workers' compensation claim. Here, the California authorities have recognized that state law provides the wronged employee with only a "make-whole" remedy determined by the seniority provisions of the applicable collective bargaining agreement. However, the California authorities, without even considering the impact of federal law and preemption, have also construed the state statute to require a state administrative judge to disregard the labor contract's grievance and arbitration procedure, and then, on the basis of the judge's own analysis of the contract, to order the employee's reinstatement with full backpay in preference to other employees with greater contractual seniority.

Five significant factors illustrate the importance of this case.

First, by construing Section 132a to require a state administrative judge to analyze and interpret the collective bargaining agreement in total disregard of the contract's grievance and arbitration provisions, the California authorities have seriously undermined the crucial role Congress intended for arbitration as the preferred method for resolving industrial disputes. *See* 29 U.S.C. § 173(d); *see also United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 573 (1960) ("arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself").

The collective bargaining agreement here provides for a grievance and arbitration procedure to resolve all disputes over the interpretation or application of the terms of the collective bargaining agreement. This Court has long held that courts and administrative agencies *must* generally defer to such a procedure. *See AT&T Technologies, Inc. v. Communications Workers of America*, 106 S. Ct. 1415, 1418-10 (1986). Indeed, in *American Manufacturing*, this Court declared unequivocally that "[t]he courts, therefore, have no business . . . determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration." 363 U.S. at 567-69. Not surprisingly, therefore, in *Allis-Chalmers*, the Court condemned any "rule that permitted an individual to sidestep available grievance procedures [because it] would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, *not the court*, who has the responsibility to interpret the labor contract in the first instance." 471 U.S. at 220 (citation omitted) (emphasis added).

In *Allis-Chalmers*, this Court recognized that federal preemption was essential because "only that result preserves the central role of arbitration in our 'system of industrial self-government,' " 471 U.S. at 219 (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)). Rather than follow this Court's clear teaching, the California authorities have construed Section 132a to permit the WCJ to disregard entirely the contract's arbitration provisions, spurn McDonnell Douglas' invitation to waive the contractual time limits to allow arbitration,

and proceed himself to analyze and interpret disputed provisions of the contract.[6]

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[6] In *Warrior & Gulf*, this Court observed that "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance [as an arbitrator], because he cannot be similarly informed." 363 U.S. at 581-82. The wholly flawed nature of the WCJ's analysis here of paragraph 789 of the contract illustrates perfectly the accuracy of the Court's observation.

The WCJ concluded that paragraph 789 required McDonnell Douglas to reinstate Raynor. Paragraph 789 provides that an employee who is "wholly or partially incapacitated from their regular work by occupational injury," may be reclassified into "an available job opening which they can do while so incapacitated."

The chairman of Local 148's bargaining committee, Douglas Griffith, testified that paragraph 789 does not permit exceptions to seniority, as Raynor contended and the WCJ found, but, rather, applies only after the exhaustion of recalls when there is an "available job opening." A18. Thus, as Mr. Griffith told the WCJ, paragraph 789 gives a disabled employee a preference only over new hires; it does not give a disabled employee any preference over existing employees. A19. McDonnell Douglas' branch seniority manager, Fred Deruso, confirmed Mr. Griffith's testimony. A20.

Stipulated evidence showed that prior to November 1981, Raynor had been *totally* incapacitated from work of any kind. Raynor was released for work *without restrictions* in November 1981. Thus, *all* the evidence presented to the WCJ demonstrated Raynor *was* able to perform his regular work, and, consequently, in any event, paragraph 789 could not apply to him.

Moreover, undisputed evidence also demonstrated that, in any event, there was not, and, since before November 1981, never had been, an alternative position suitable for Raynor. Russell Peterson, manager of employment and placement services at the Long Beach facility, testified that Raynor had previously performed only janitorial tasks and that Raynor was unqualified for any skilled work, such as that performed by a structural assembler. A23 - A24. Mr. Deruso confirmed this, and stated that there were no J6J3

Second, there is a sharp split between the federal circuits over the extent to which the *Allis-Chalmers*' "inextricably intertwined" test limits a state-law claim for retaliatory discharge in response to the filing of a workers' compensation claim by an employee covered by a collective bargaining agreement. *Compare Johnson v. Hussman Corp.*, 805 F.2d 795, 797 (8th Cir. 1986) (Missouri statute preempted); *Vantine v. Elkhart Brass Manufacturing Co.*, 762 F.2d 511, 517 (7th Cir. 1985) (Indiana common law right preempted); *Edwards v. Western Manufacturing, Division of Montgomery Elevator Co.*, 641 F. Supp. 616, 618-20 (D. Kan. 1986) (Kansas common law right preempted); *Northwest Industrial Credit Union v. Salisbury*, 634 F. Supp. 191, 194 (W.D. Mich. 1986) (Michigan common law right preempted) *with Baldracchi v. Pratt & Witney Aircraft Division, United Technologies Corp.*, 814 F.2d 102, 107 (2nd Cir. 1987) (Connecticut statute not preempted); *Herring v. Prince Macaroni of New Jersey, Inc.*, 799 F.2d 120, 124 n.2 (3d Cir. 1986) (New Jersey statute not preempted); *Benton v. Kroger Co.*, 635 F. Supp. 56, 58 n.1 (S.D. Tex. 1986) (Texas statute not preempted). There is a similar difference of views on this issue between state Supreme Courts. *Compare, e.g., Brinkman v. Montana*, 729 P.2d 1301, 1308-09 (Mont. 1986) (suit preempted) *with Gonzalez v. Prestress Engineering*

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openings after Raynor's layoff date. A23. Mr. Peterson also testified that McDonnell Douglas had not hired anyone with Raynor's qualifications to *any* position. A21.

Thus, the WCJ's analysis of paragraph 789 that it required McDonnell Douglas to reinstate Raynor despite his admittedly limited seniority was wholly contrary to the established "law of the shop."

Corp., 115 Ill. 2d 1, 503 N.E.2d 308, 311-12 (1986) (no preemption of state statute); *MGM Grand Hotel-Reno Inc. v. Insley*, 728 P.2d 821, 825 (Nev. 1986) (no preemption of common law action).

This case presents this Court with an opportunity to resolve these splits of authorities and to harmonize the countervailing pressures of state and federal law in this presently highly contentious area.

There would seem to be three possible ways to achieve this harmonization. One approach is to allow *state law* to determine *both* whether the discharge was retaliatory and what should be the appropriate remedy under the collective bargaining agreement. This is the approach adopted here by the California authorities. Because deciding the appropriate remedy requires a state judge or administrative agency to analyze the meaning of the collective bargaining agreement, this first approach impermissibly ignores the supremacy of federal labor law. A second approach is that followed by those circuits which have held that *federal law* preempts *both* the state-law claim and the remedy. This "totally preemptive" approach has the benefit of protecting federal labor law principles and the crucial role of arbitration. However, because the state-law claim does not arise from a breach of the collective bargaining agreement, this second approach probably produces an "overreaching" of federal preemption. *See Allis-Chalmers*, 471 U.S. at 212 ("[I]t would be inconsistent with congressional intent . . . to preempt state rules that proscribe conduct, or establish rights and obligatons, independent of a labor contract.").

A third approach would require preemption *only to the extent* that interpreting a collective bargaining

agreement was *necessary* to determine an employee's status under a state-mandated "make-whole" remedy. *Cf. Baldracchi*, 814 F.2d at 106 (damages "might involve examination of the labor contract"); *Benton*, 635 F. Supp. at 58 n.1 (no preemption when "it can hardly be said that the resolution of plaintiff's state claim in the instant case is 'substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract' "). McDonnell Douglas has argued this latter approach throughout this matter, and now urges it on this Court, because it, alone of the three approaches, achieves an appropriate harmony between state and federal concerns.

Third, permitting state administrative agencies to analyze and interpret the seniority provisions of a collective bargaining agreement which the parties to the contract — the employer and the union — have intended to be interpreted by an arbitrator familiar with labor relations and industrial seniority will seriously undermine the pervasive and central role that seniority plays in regulating workplace relationships. Eighty-nine percent of major collective bargaining agreements include seniority provisions, *see Collective Bargaining Negotiations and Contracts* 75:1 (BNA 1983), and just last term, in *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), this Court again recognized the crucial importance of collectively bargained seniority:

> A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations make up what is probably the most valuable

> capital asset that the worker 'owns,' worth more even than the current equity in his home."

Id. at 1851 (quoting Fallon & Weller, *Conflicting Models of Racial Justice*, 1984 S. Ct. Rev. 1, 58 (1984)).[7]

Fourth, the question presented in this case seems certain to arise again in the future. At least eleven states and the District of Columbia provide that an employer who discharges an employee in retaliation for filing a workers' compensation claim "*shall*" reinstate the discharged employee.[8] Three other states expressly

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[7] The effect here of the California authorities disregard of collectively bargained seniority is that McDonnell Douglas will have to employ Raynor in preference to other employees who "own" substantially greater collectively bargained seniority than Raynor.

[8] *See* Cal. Lab. Code § 132a(1); Conn. Gen. Stat. § 31-290a; D.C. Code Ann. § 36-342; Haw. Rev. Stat. § 378-32(2); N.J. Stat. Ann. § 34:15-39.1; N.Y. Workers' Compensation Law § 120; N.C. Gen.Stat. § 97-6.1; Okla. Stat. Ann. Tit. 85, § 5; Ore. Rev. Stat. Ann. § 659.410; Tex. Rev. Civ. Stat. Ann. Art. 8307(c); Va. Code Ann. § 65.1-40.1; Wis. Stat. Ann. § 102.35. Additionally, the federal Longshoremen's and Harbor Workers' Compensation Act requires reinstatement for a retaliatory discharge. *See* 33 U.S.C. § 948a.

Interestingly, at least three of these states expressly except reinstatement where this would conflict with federal law as expressed in the terms of a collective bargaining agreement. *See* Haw. Rev. Stat. § 378-32(3) ("This paragraph shall not apply to any employer . . . who is a party to a collective bargaining agreement which prevents the continued employment or re-employment of the injured employee."); Ore. Rev. Stat. § 659.415(2) ("Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement."); Wis. Stat.

permit reinstatement for an employee discharged for filing a workers' compensation claim.[9] Fifteen more states have recognized the tort of retaliatory discharge for filing a workers' compensation claim, either by statute[10] or judicial decision,[11] and would no doubt consider reinstatement a suitable remedy.

Finally, if this matter is not now decided in favor of federal preemption, it will, almost certainly, return quickly to the federal courts as a far more difficult issue. If McDonnell Douglas reinstates Raynor as the California authorities now demand, Local 148 will be required by its duty of fair representation to grieve and eventually press to arbitration Raynor's preferential employment in clear contravention of the seniority rights of his fellow employees.[12] An arbitrator will

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Ann. § 102.35(3) ("In determining the availability of suitable employment . . . the provisions of a collective bargaining agreement with respect to seniority shall govern.").

[9] *See* Mass. Gen. L. ch. 152 § 75A; Me. Rev. Stat. Ann. Tit. 58 § III; Ohio Rev. Stat. § 4123.90.

[10] *See* Ala. Code § 25.5-11.1; Ariz. Const. Art. 18, § 3; Ark. Stat. Ann. § 81-1335(b); Fla. Stat. § 440.205; Ill. Rev. Stat. § 138.4(h); Ky. Rev. Stat. Ann. § 342.197; La. Rev. Stat. § 1361(b); Md. Ann. Code Art. 101, § 39A(a); Minn. Stat. § 176.82; Mo. Rev. Stat. § 287.80.

[11] *Frampton v. Central Indiana Gas Co.*, 276 Ind. 249, 297 N.E.2d 425, 428 (1973); *Murphy v. City of Topeka-Shawnee County Department of Labor Services*, 6 Kan. App. 2d 488, 630 P.2d 186, 192 (1981); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151, 154 (1976); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 445 (Tenn. 1984).

[12] Indeed, in a letter to McDonnell Douglas which was before the WCJ, Local 148 placed McDonnell Douglas "on notice that . . . the UAW will take appropriate action to protect and insure enforcement of their collective bargaining agreements."

then, almost certainly, order McDonnell Douglas to discharge Raynor as the seniority provisions demand, and a federal court will most assuredly order enforcement of the arbitrator's award. McDonnell Douglas will then be required to violate either the federal court's order or the directly contradictory order of the state authorities.

It was, however, precisely to prevent such impossible dilemmas that this Court, in *Hechler, Allis-Chalmers*, and earlier decisions, developed the doctrines of federal preemption.

CONCLUSION

For the reasons set forth above, this Court should *either* summarily vacate and remand this matter with instructions to reconsider the application of the remedial provisions of California Labor Code Section 132a in light of this Court's decisions in *Perry v. Thomas, IBEW v. Hechler, Shearson/American Express, Inc. v. McMahon*, and *Allis-Chalmers Corp. v. Lueck, or* grant certiorari to review fully the important question of federal law presented by this matter.

Respectfully submitted,

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Dated June 23, 1987

APPENDIX A

APPENDIX A

WORKERS' COMPENSATION
APPEALS BOARD

81 LB 115051
81 LB 115046

BRYAN RAYNOR
v.
McDONNELL DOUGLAS CORP

Injury Dates: March 21, 1981 (046)
March 7, 1980
Workers' Compensation Judge: JOEL W. GRAY
Date: November 14, 1984

CANTRELL, et al, by Donald Pekich, Attorneys for Applicant THARP & SECIA, by Rick M. Secia, and IRELL & MANELLA, by James N. Adler, Attorneys for Defendant

JOINT OPINION ON DECISION

It will be found that the Collective Bargaining Agreement bars the applicant from re-instatement to his employment and collecting back wages.

The purpose of reinstatement to employment and collection of back wages is to restore the applicant to the status that he had before the discriminatory act.

It is not the intention of these provisions to place the applicant in a better position than he had before the discriminatory act or worse yet to discriminate against

a co-employee who has the same seniority or even more seniority than the applicant.

The only actual penalty aspects of Labor Code Section 132a is to increase the normal benefits by one-half which was done.

The testimony presented by the defense witnesses as well as the defendant's trial brief was persuasive that the applicant was *not* entitled to reinstatement to his employment and back wages since according to the terms of the Collective Bargaining Agreement, the applicant would have been terminated as of August 7, 1981, which was by nondiscriminatory operation of the Collective Bargaining Agreement.

The Collective Bargaining Agreement has to be considered relevant to the provisions of Labor Code Section 132a since if the Collective Bargaining Agreement is ignored, then the result of Labor Code Section 132a could conceivably be discriminatory towards a fellow employee who has the same or even more seniority than the applicant who could be bumped by the applicant and which would then place the applicant in a better position than he had before the discriminatory act.

JOEL W. GRAY
Workers' Compensation Judge

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRYAN RAYNOR,	)	**CASE NO.**
	)	**81 LB 115046**
Applicant	)	**81 LB 115051**
	)	
vs.	)	**FINDING**
	)	**AND**
McDONNELL	)	**ORDER**
DOUGLAS	)	
CORPORATION	)	
	)	
Defendant	)	
	)	

CANTRELL, et al, by Donald Pekich, Attorneys for Applicant THARP & SECIA, by Rick M. Secia, and IRELL & MANELLA, by James N. Adler, Attorneys for Defendant

This matter having come on for further hearing; all parties having appeared and the matter having been regularly submitted, the Honorable JOEL W. GRAY, Workers' Compensation Judge, now finds that the Collective Bargaining Agreement bars the applicant from re-instatement to his employment and collecting back wages, and orders as follows:

O R D E R

IT IS ORDERED that applicant take nothing further.

/s/ JOEL W. GRAY

JOEL W. GRAY,
Workers' Compensation Judge

DATED: November 14, 1984
at Long Beach, California

SERVICE BY MAIL ON ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD
EFFECTED ON ABOVE DATE.
BY: 

WORKERS' COMPENSATION
APPEALS BOARD
81 LB 115051
81 LB 115046

BRYAN RAYNOR
v.
McDONNELL DOUGLAS CORP

Injury Dates: March 21, 1981 (046)
March 7, 1980
Workers' Compensation Judge: JOEL W. GRAY
Date: December 14, 19844

CANTRELL, et al, by Donald Pekich, Attorneys for Applicant THARP & SECIA, by Rick M. Secia, and IRELL & MANELLA, by James N. Adler, Attorneys for Defendant

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I & II

INTRODUCTION AND DISCUSSION

The applicant has filed a timely (26th day, the 25th day falling on Sunday) Joint Petition for Reconsideration whereby he is aggrieved from the "Finding and Order" dated November 14, 1984, which found that the Collective Bargaining Agreement barred the applicant from re-instatement to his employment and from collecting back wages.

By way of a "Joint Supplemental Findings and Award (RE 132a)" dated April 19, 1983, the defendant-employer was found to be in violation of the provisions of Labor Code Section 132a; and the applicant was awarded reinstatement to his employment, back wages, less credit for any amounts earned, and additional workers' compensation benefits pursuant to Labor Code Section 4553, to wit, a 50% increase in his workers' compensation benefits.

By virtue of the Collective Bargaining Agreement, the defendant-employer refused to reinstate the applicant to his employment or pay his back wages.

The defendant-employer did contend however, that the 50% increase of the applicant's workers' compensation benefits had been paid which the applicant is apparently also disputing.

This matter then came on for hearing on September 25, 1984, regarding the enforcement of the award, to wit, the reinstatement of the applicant to his employment and the collection of back wages.

The essence of the defendant-employer's case is that the Collective Bargaining Agreement which is Appeals Board Exhibit "Z-2" governed; and that according to the seniority provisions of said agreement, the applicant would have been laid off anyway even if he had not been discriminated against.

This judge therefore reasoned that the purpose of reinstatement to employment and the award of back wages was to place the applicant in the same position that he was before the discriminatory act and that the applicant was not to be placed in a better or a more favorable position than he was in before his termination.

In fact, it was determined that by reinstating the applicant and awarding back wages, it was conceivable that a co-employee who had the same seniority rights as the applicant or even a higher seniority could be bumped by the applicant's reinstatement; and therefore, an unfair result would occur.

It should be noted that at the conclusion of the 9-25-84 hearing, the defendant was allowed 15 days in which to file a written brief and argument, and the applicant was then given 20 days in which to respond with a written brief and argument.

On October 11, 1984, the "Defendant's Trial Brief" was received.

Since there was *no* response from the applicant, the "Finding and Order" issued on November 14, 1984, which was 34 days following the Defendant's Trial Brief, which was the only brief that this judge had the benefit of reviewing.

The applicant's Petition is this judge's first opportunity to review the applicant's argument.

In essence, the applicant is contending that the Collective Bargaining Agreement expired on October 9, 1983, and that a subsequent strike occurred between October 17, 1983, and February 14, 1984, and that therefore, during this time a collective bargaining agreement didn't exist.

Furthermore, the applicant is contending that even if a collective bargaining agreement did exist, that said agreement did make provisions for persons wholly or partially disabled due to occupational injury or disease and that this particular section of the Collective Bargaining Agreement mandated placement in an available job within the applicant's capacity, and also

provided for transfer of seniority in the event of permanent disability.

Admittedly, if the rationale of the defendant-employer is followed, the employer could conceivably hide behind the shield of a collective bargaining agreement and discriminate against an employee with impunity.

The employee would then be in a "catch 22" situation, being awarded an empty judgment that cannot be enforced.

There is no question that the applicant was remiss in not filing his trial brief; however, in all fairness to the applicant who, after all, does have an award of reinstatement to his employment and the collection of back wages pursuant to the "Joint Supplemental Findings and Award (Re 132a)" dated April 19, 1983, this judge has the following recommendation:

III

RECOMMENDATIONS

The applicant's Petition for Reconsideration should be granted for the purpose of further study regarding the terms of the Collective Bargaining Agreement either by the Honorable Board or remanded to the trial level for said study and further action.

Further, if the 50% increase of the workers' compensation benefits has *not* been paid, then it should be ordered paid forthwith.

JOEL W. GRAY,
Workers' Compensation Judge
WORKERS' COMPENSATION
APPEALS BOARD

gs
SERVED ON: Cantrell, et al, Box 1700, Long Beach, Ca 90801, MANELLA & ADLER, 1800 Ave. of the Stars #900, L.A, Ca. 90067 THARP & SECIA

By:

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRYAN RAYNOR,	)	**CASE NO.**
	)	**81 LB 115-051**
Applicant	)	**81 LB 115-046**
	)	
vs.	)	
	)	**OPINION AND**
McDONNELL	)	**ORDER**
DOUGLAS	)	**GRANTING**
CORPORATION,	)	**RECONSIDERATION**
INDUSTRIAL	)	**AND DECISION**
INDEMNITY	)	**AFTER**
COMPANY,	)	**RECONSIDERATION**
	)	
Defendant	)	
	)	

Applicant, Bryan Raynor, seeks reconsideration of the Findings and Order of November 14, 1984, wherein it was found, that the collective bargaining agreement barred the applicant from reinstatement of his employment and collecting back wages and wherein it was ordered that applicant take nothing. Petitioner contends in essence (1) that the collective bargaining agreement expired on October 9, 1983; a subsequent strike occurred between October 17, 1983 and February 14, 1984; and therefore, during this time the collective bargaining agreement did not exist; and (2) that even if a collective bargaining agreement did exist; the agreement made provisions for persons wholly or partially disabled due to an occupational injury or disease and that this particular section of the collective

bargaining agreement mandated placement in an available job within the applicant's capacity, and also provided for transfer of seniority in the event of permanent disability.

The record reflects that the April 19, 1983 Joint Supplemental Findings and Award regarding Labor Code Section 132a found that the defendant employer was in violation of Labor Code Section 132a, and the applicant was awarded reinstatment of his employment, back wages, less credit for any amounts earned, and additional workers' compensation benefits pursuant to Labor Code Section 4553, to wit, a 50% increase in his workers' compensation benefits. Because of the collective bargaining agreement, the defendant employer has refused to reinstate the applicant to his employment, or to pay back wages. The defendant employer contends that the 50% increase of applicant's workers' compensation benefits had been paid. Applicant is also disputing this matter.

Based upon the record and for the reasons stated by the workers' compensation judge in his report and recommendation, we will grant the petition, rescind the Finding and Order and return the case to the trial level for further hearing regarding the collective bargaining agreement and also to determine whether or not the fifty percent increase in workers' compensation benefits has been paid.

For the foregoing reasons.

IT IS ORDERED that applicant's Petition for Reconsideration filed December 10, 1984, be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the Finding and Order of November 14, 1984, be, and the same hereby is, RESCINDED and the case RETURNED to the trial level for further proceedings and decision.

WORKERS' COMPENSATION
APPEALS BOARD

I concur.

Dated and filed at
San Francisco, CA

FEB - 1 1985

Service by mail this date on all parties shown on the Official Address Record

md

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRYAN RAYNOR,	)	**CASE NO.**
	)	**81 LB 115046**
Applicant	)	**81 LB 115051**
	)	
vs.	)	**MINUTES OF**
	)	**HEARING**
McDONNELL	)	**(Further)**
DOUGLAS	)	
CORPORATION	)	
	)	
Defendant	)	
	)	

Place and Time:	Long Beach, California December 13, 1985, 9 a.m.
Judge:	JOEL W. GRAY
Reporter:	Mia E. Miller
Appearances:	Applicant Cantrell, Green, Pekich & Zaks, by Richard J. Cantrell, attorneys for applicant Secia & Davidson, by Rick M. Secia, and Irell & Manella, by James N. Adler, attorneys for defendant employer
WITNESSES:	Applicant Douglas Griffith Fred O. Derouso Russell K. Peterson

Lois Hamilton
Kenneth Paul Ericksen

EXHIBITS: WCAB EXH. Z-13:
Consisting of the following:
13(a) - Copy of Employee Status Change Notice, Print Date 04-01-81;
13(b) - Copy of Telegram 04/1/81 to Bryan Raynor;
13(c) - Copy of Employee Status Change Notice, Print Date 07-01-80;
13(d) - Copy of Employee Status Change Notice, Print Date 08-07-80;
13(e) - Copy of Employee Status Change Notice, Print Date 10-08-80.

WCAB EXH. Z-14:
Copy of Personnel-West Employment Agreement, dated 9-21-84, with attachments, 6 pages, Z-14(a) through Z-14(f).

WCAB EXH. Z-15
FOR IDENTIFICATION ONLY:
Copy of Opinion and Order Granting Reconsideration and Decision after Reconsideration, regarding Adolphus Daniels, Case No. 80 VN 97074.

WCAB EXH. Z-16:
Copies of various ads placed by the employer, 12 pages.

WCAB EXH. Z-17:
Copy of Memorandum, dated April 1, 1981, Termination Rating for Bryan K. Raynor.

WCAB EXH. Z-18:
Copy of Hourly Seniority Listing, effective date of 12-09-85, Page 23 and Page 24.

WCAB EXH. Z-19:
National Agreement between Douglas Aircraft Company and International Union United Automobile, Aerospace and Agricultural Implement Workers of America and Local 148, Long Beach, California. Effective Date: 10 October 1983.

ISSUES - SAME AS AT THE HEARING OF SEPTEMBER 25, 1984, AS FOLLOWS:

1. Enforcement of the Award, to wit, reinstatement to employment and back wages.

2. Collective bargaining agreement barring such reinstatement and back wages.

3. Relevancy of collective bargaining agreement regarding Labor Code Section 132a.

4. Application of collective bargaining agreement barring such reinstatement and back wages.

DISPOSITION;

The matter is continued to January 3, 1986, at 9 a.m., before Judge Gray, for Conference Calendar, to produce various documents, to wit, arbitration decisions.

SUMMARY OF EVIDENCE;

The applicant was called, sworn, and testified substantially as follows:

After he received his termination notice in 1981, he never received any notice of any kind regarding being eligible to be rehired or to be considered to be rehired.

He attempted to return to work in May 1983 on the instructions of his attorney. He called the Labor Relations Department at Douglas by phone and talked to some secretary and was told to contact his attorney. He told the people at Labor Relations that he was supposed to return to work and he was told by them that there was no recollection of him returning to work and to advise his attorney.

He was never offered any type of employment from Douglas.

At this time he would be willing to go back to Douglas in any position. He would work anywhere at Douglas and it wouldn't matter if it was within the collective bargaining agreement.

Cross-Examination by Mr. Adler:

Applicant testified that he called about returning to his regular job and he did not apply for any other position. He received a copy of the decision from the Appeals Board and understood the decision and understood that Douglas was found to have discriminated against him.

Redirect Examination:

The applicant testified that when he called Labor Relations in 1983, he explained to the people at the other end of the line that he was supposed to return to work. He did not say anything about his regular job or

any particular job. He was ready to report to work at that time.

Recross-Examination:

He told Labor Relations that he was supposed to be reinstated because of the decision from the Appeals Board and because of the decision he was supposed to be reinstated and returned to work.

****

DOUGLAS GRIFFITH was called by the applicant, sworn, and testified substantially as follows:

He is chairman of the Bargaining Unit of the U.A.W. 148. He knows Ruth Journigan and she is now an international representative of the Union. She used to work at Douglas and was a member of the U.A.W. Union and a member of the Bargaining Unit.

Mr. Adler then called Mr. Griffith as his witness, and he testified substantially as follows:

His duties are chief spokesman for the Union and the collective bargaining unit. This has been since June 20, 1981. Prior to that he had been involved with the Union by being a steward, a chief steward, a trustee, and an administrative assistant to the president. He has been active with the U.A.W. since 1966, and has been employed at Douglas since December 15, 1965.

He is familiar with the collective bargaining agreement. He was then referred to page 75 of the collective bargaining agreement, effective date of October 17, 1980.

Under Voir Dire by Mr. Cantrell the witness was referred to Paragraphs 789 and 790 of the collective bargaining agreement and he stated that this language

has been there for a long time. Regarding Page 70, Paragraph 776 of the collective bargaining agreement, this language goes back to at least 1980.

Direct Examination by Mr. Adler continues:

To the witness' knowledge, the Company, Douglas, has never requested an out of seniority retention, recall, or hire under Section 790 of the collective bargaining agreement. When this clause came up for discussion, neither the Company nor the Union could come up with a scenario where that language would be exercised. However, it was agreed to retain this clause, although it was never exercised.

The witness testified that even if there is a violation of Labor Code Section 132a, this clause would not be exercised, because if this clause would be exercised, it would violate someone else's seniority rights. This clause gives the Company the right to be in violation of the Union contract, and before this clause would ever be exercised there would have to be an extraordinary circumstance that would warrant it. Before this clause would ever be exercised, it would have to be in the best interest of the membership of the Union. For example, to prevent a shutting down of an operation, etc. However, no one is that indispensable.

The witness was then referred to Paragraph 789 of the bargaining agreement and he stated this would be applicable if there was an available opening or if an injury was permanent and the employee could be classified to another position if there was an opening.

There is a three-member seniority committee which reports to the witness. They monitor the Company seniority list and if there is a violation they first check with the Company and then with the witness and bring it to a grievance.

Paragraphs 700 and 701 define seniority. There is a single seniority list for a single class.

Paragraph 789 does not apply while an employee is on disability leave. It applies when the person returns to work with a disability and work restriction. It does not apply if a person is on disability leave and that person is carried as continuing on leave, and when that person comes back they are then placed on layoff. No inquiry is made if the person can perform the work of his own job or any other job.

Regarding Paragraph 776, if a person has at least 90 days of seniority, he is entitled to a leave of absence for not more than 2 years. If a person is not on leave for in excess of 2 years, Section 776 does not apply.

Cross-Examination:

The witness testified that if an employee is on layoff, he is unable to bid, but if he held another classification previously, he can bump back and have one opportunity. One can only hold one classification at a time.

Regarding Paragraph 202, this indicates they can only transfer people to other classifications if the agreement is not violated, and it cannot be done unilaterally. An employee can be transferred to a job outside of his bargaining unit, if someone else's seniority is not affected and it doesn't affect any other agreement of the bargaining unit.

There are about 7,500 to 8,000 employees covered by the collective bargaining agreement and about the same number that are not covered. 15% to 20% of the workers who are not management are not covered by any agreement.

A person who loses his seniority under the collective bargaining unit can be transferred to another position not covered.

****

FRED O. DEROUSO was called by the defendant, sworn, and testified substantially as follows:

He is branch manager and oversees the seniority operation since January 1979. He heard Mr. Griffith testify and agrees with all of his testimony. The witness stated that he checks to see where a person goes when his seniority allows him to go.

Testimony regarding the determination of the applicant's seniority was given at the previous hearing.

During the strike at Douglas between October 1983 and February 1984, recalls were sent out in seniority order. No recalls were made regarding the J-6, J-3 classification.

Regarding Appeals Board Exhibit Z-15(c), the witness explained the reinstatement memorandum and stated that this memorandum fully restores the applicant's seniority rights.

Cross-Examination:

The witness testified and this memorandum restores seniority rights under the U.A.W. contract and has no effect on any employee.

Redirect Examination:

The witness testified there are no seniority rights to move throughout the plant. The Company has the prerogative of offering a job if no one else's seniority is involved.

****

RUSSELL K. PETERSON was called by the defendant, sworn, and testified substantially as follows:

He is manager of employment and placement and has been in that position on and off for 25 years. During the U.A.W. strike between October 1983 and February 1984, no new employees came to work under the U.A.W. contract. Some conditional offers were made, but they were rescinded as the result of an agreement with the Union.

The Company did not seek to employ any unskilled workers during the strike. The witness was shown various advertisements placed by the Company during the period of the strike.

The witness stated he reviewed the applicant's employment application and deposition and stated that the Company never sought to hire employees with the applicant's qualifications. He reviewed the applicant's personnel file and there was no document contained therein that indicated that the applicant was not eligible for rehire.

Cross Examination:

The witness explained the effect of termination as opposed to layoff. If an employee is terminated he can be rehired under some circumstances. A reinstatement would wipe out a termination. If one quits to leave the Company voluntarily or is laid off, it does not indicate termination.

The witness stated his position only deals with people who are hired or re-hired and not terminations.

He did see a termination rating for the applicant, dated April 1, 1981. "It's a memo to Labor Relations

from the applicant's supervisor regarding the applicant's performance. The applicant's performance was rated 2-3-3. 2 is fair and 3 is poor. It is true that in rehiring the applicant, this rating would be taken into consideration. A rating of this type would be considered in re-hiring an employee.

****

LOIS HAMILTON, called by defendant, was sworn and testified substantially as follows:

She is the administrator of workers' compensation for Douglas. She oversees industrial training and reviews all workers' compensation settlement awards and also reviews the work limitations along with the Company doctor.

The witness testified that she reviewed the medical report of Dr. A.C. Niemeyer, dated January 11, 1982. No work restrictions were indicated in this report.

Cross-Examination:

The witness testified that following a disposition in a workers' compensation case she reviews the disposition of the case along with all the medical reports, and also along with the dispensary doctor, and then a determination is made if work restrictions are to be imposed on the employee. She does not place work restrictions herself without the assistance of a doctor. This is done without regard to the age of the medical report in some instances and sometimes when no physical exam by the Company has been given, but it is also reviewed with the dispensary doctor.

She reviewed Dr. Niemeyer's report in 1982 and again today. She does not know if any doctor at the

Company has reviewed any medical reports regarding the applicant since 1982.

She does not know if a job description was done for the applicant.

FRED O. DEROUSO was recalled by Mr. Adler and testified substantially as follows:

He ran a seniority tape of all the J-6, J-3 jobs and currently there are three employees in this classification. Two of them were hired on October 2, 1978, and one of them on July 9, 1979.

Cross-Examination:

The witness testified that J-6, J-3 is a manufacturing assistant. It is different from a structural assembler, but he does not have the job description with him. A structural assembler is more skilled then the J-6, J-3 job. The J-6, J-3 job is akin to a janitor's position.

There are maybe 1,000 structural assemblers at Douglas who have seniority from 40 years on the job and down. The Company has been hiring structural assemblers.

****

RUSSELL K. PETERSON was recalled by Mr. Adler and testified substantially as follows:

When an employee is laid off a rehire rating is not made. If an employee has an AWOL quit, he can be reconsidered for rehire.

A structural assembler is a skilled job. A J-6, J-3 is not a skilled position, and this applicant would only be considered for an unskilled position.

Cross-Examination:

He read the applicant's deposition today. According to the deposition the applicant worked with a broom and dust pan and did cleanup work around the airplane. The applicant did not do structural assembly work.

****

KENNETH PAUL ERIKSEN, called by defendant, was sworn and testified substantially as follows:

He is a director of human resources administration and has been for the last 3 years. Before that he was a staff assistant to the vice president. He has worked for Douglas for 23 years.

During the strike he was manager of labor relations. During the period of the strike he still applied seniority and after the strike the agreement was retroactive to October 10, 1983. Seniority provisions are the same as in the prior agreement. Employees only have rights as set forth in the collective bargaining agreement.

Cross-Examination:

The witness testified a person is not precluded from being employed in a position outside of the agreement.

During the strike the recalls were in seniority order. He did not send a letter to every employee who had recall rights, only to workers that were needed. If there were no responses, then more would be sent out.

During the strike they also posted job positions at the plant and the employees could bid pursuant to Article 7. He had some non-bargaining people doing bargaining work.

Redirect Examination:

The witness stated that all of the workers came from inside the plant.

JOEL W. GRAY
WORKERS' COMPENSATION
JUDGE

JWG/mem

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BRYAN RAYNOR,	)	**CASE NO.**
	)	**81 LB 115046**
Applicant	)	**81 LB 115051**
	)	
vs.	)	**SUPPLEMENTAL**
	)	**FINDINGS AND**
McDONNELL	)	**AWARD**
DOUGLAS	)	**(Labor Code § 132a)**
CORPORATION	)	
	)	
Defendant	)	
	)	

CANTRELL, et al, by Donald Pekich, Attorneys for Applicant THARP & SECIA, by Rick M. Secia, and IRELL & MANELLA, by James N. Adler, Attorneys for Defendant

This matter having come on for further hearing; all parties having appeared, and the matter having been regularly submitted, the Honorable JOEL W. GRAY, Workers' Compensation Judge, now finds and awards as follows:

FINDINGS OF FACT

1. Defendant, McDonnell Douglas Corporation, did in fact violate Labor Code Section 132a, entitling applicant to reinstatement to his employment as a structural assembler outside of the bargaining agreement, if necessary, and reimbursement of lost wages.

2. The Collective Bargaining Agreement does not bar such reinstatement and is not relevant in this instance.

3. A reasonable attorneys' fee will be determined at a later date predicated upon 15% of the applicant's recovery.

AWARD

AWARD IS MADE in favor of BRYAN RAYNOR against McDONNELL DOUGLAS CORPORATION of reimbursement for lost wages and work benefits, less credit for any sums paid and/or monies earned in an amount to be adjusted by and between the parties.

ORDERS

IT IS ORDERED that defendant, McDONNELL DOUGLAS CORPORATION, reinstate the applicant.

IT IS FURTHER ORDERED that defendant, McDONNELL DOUGLAS CORPORATION withhold 15 percent of all amounts to be reimbursed to the applicant pending a court determination on reasonable attorney's fees.

JOEL W. GRAY
Workers' Compensation Judge

Dated at Long Beach, CA

MAY 19 1986

Served by mail on all parties shown on official address record

By: Chick Ingham

CASE NO.
81 LB 115051
81 LB 115046

BRYAN RAYNOR
v.
McDONNELL DOUGLAS CORP

Workers' Compensation Judge: JOEL W. GRAY
Date: November 14, 19844
Attorneys: Cantrell, Green, Pekich & Zaks, by Richard J. Cantrell, attorneys for applicant
Secia & Davidson by Rick M. Secia, and
Irell & Manella, by James N. Adler, attorneys for defendant employer

OPINION AND DECISION OF WORKERS' COMPENSATION JUDGE

The employer had previously been found to be in violation of LC Section 132a and applicant was awarded back wages and reinstatement to his employment.

The employer then refused to reinstate the applicant or pay the back wages.

It was then subsequently found that the Collective Bargaining Agreement barred the applicant from reinstatement to his employment and collecting his back wages.

However, by way of "Opinion and Order Granting Reconsideration and Decision After Reconsideration" dated 2/1/85, the applicant's Petition was granted; the Findings and Order was rescinded; and the case was

returned to the trial level for further hearing regarding the collective bargaining agreement.

After further hearings on 12/13/85 and 1/3/86 and the filing of written arguments and Points and Authorities, the following pertinent information was obtained.

That Sections 789 and 790 do contain provisions which would permit reinstatement to employment, specifically Section 790 which states:

> "*Retention Out of Seniority Order*:
>
> "By agreement between the Company and the Union, in writing, persons may be retained, recalled, or hired without regard to the provisions of this Article."

Although the defendant witness testified that this clause would not be exercised even if there was a violation of LC Section 132a, since someone else's seniority rights would be violated, *however it was also testified that a person who loses his seniority under the collective bargaining unit can be transferred to another position not covered.*

Also, it was testified that the applicant would have only been considered for an unskilled position and that a structural assembler is a skilled job.

However, it was previously found by way of the Findings and Award that issued on 4/16/82 that the applicant's occupation was that of a structural assembler.

It was further testified that the company has been hiring structural assemblers.

It was also testified that about 7,500 to 8,000 employees are *not* covered by the bargaining agreement.

In view of the violation of LC Section 132a, the employer is obligated to reinstate the applicant to his employment as a structural assembler outside of the bargaining agreement, if necessary, and pay all back wages.

Therefore, it will be found that the applicant is to be reinstated to his employment and paid all back wages, less credit for any sums paid and/or monies earned in an amount to be adjusted by and between the parties.

Further that the Collective Bargaining Agreement does not bar such reinstatement and is not relevant in this instance.

Joel W. Gray

JOEL W. GRAY
Workers' Compensation Judge

/ci

WORKERS' COMPENSATION
APPEALS BOARD
81 LB 115051
81 LB 115046

BRYAN RAYNOR
v.
McDONNELL DOUGLAS CORP
INDUSTRIAL INDEMNITY

Injury Dates: March 21, 1981 (046)
March 7, 1980 (051)
Workers' Compensation Judge: JOEL W. GRAY
Date: June 19, 1986

CANTRELL, GREEN, PEKICH & ZAKS, by Richard J. Cantrell, Attorney for Applicant
SECIA & DAVIDSON, by Rick M. Secia, and IRELL & MANELLA, by James N. Adler, Attorneys for Defendant Employer

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

The defendant employer has filed a timely but *unverified* Joint Petition for Reconsideration whereby it is aggrieved from the "Supplemental Findings and Award (Labor Code Section 132a)" dated May 19, 1986.

Specifically, the defendant is aggrieved from the findings that the applicant is entitled to reinstatement to his employment as a structural assembler, reimbursement of lost wages, and that the Collective Bargaining Agreement does not bar such reinstatement.

It was previously found by way of "Joint Supplemental Findings and Award (Re 132a)" dated April 19, 1983, that the defendant employer was in violation of the provisions of Labor Code Section 132a and that the applicant, inter alia, was entitled to reinstatement of his employment and back wages.

This decision was affirmed by the Appeals Board and the Court of Appeals, Second District.

Subsequently, the matter came on for hearing for the enforcement of the award since the employer refused to reinstate the applicant to his employment and pay back wages.

A "Findings and Order" subsequently issued on November 14, 1984, whereby it was found that the Collective Bargaining Agreement barred the applicant from reinstatement to his employment and collecting back wages.

A Petition for Reconsideration was filed by the applicant, and this judge recommended that the Petition for Reconsideration be granted and that the case be remanded to the trial judge for further study of the terms of the Collective Bargaining Agreement.

These matters again came on for hearings on December 13, 1985 and January 3, 1986, whereby there was extensive testimony by the applicant and five witnesses.

As a result of said hearings, this judge issued the latest Supplemental Findings and Award to which the defendant employer is aggrieved.

II

DISCUSSION

As a result of the December 13, 1985 and January 3, 1986 hearings, as well as the filing of written Arguments and Points and Authorities which are in the file, the following pertinent information regarding the Collective Bargaining Agreement was obtained.

That Sections 789 and 790 does contain provisions which would permit reinstatement to employment, specifically Section 790 which states:

> "*Retention Out of Seniority Order:*
>
> "By agreement between the Company and the Union, in writing, persons may be retained, recalled, or hired without regard to the provisions of this Article."

Although the defendant witness testified that this clause would not be exercised even if there was a violation of LC Section 132a, since someone else's seniority rights would be violated, *however, it was also testified that a person who loses his seniority under the collective bargaining unit can be transferred to another position not covered.*

Also, it was testified that the applicant would have only been considered for an unskilled position and that a structural assembler is a skilled job.

However, it was previously found by way of the Findings and Award that issued on April 16, 1982, that

the applicant's occupation was that of a structural assembler.

It was further testified that the company has been hiring structural assemblers and that about 7,500 to 8,000 employees are *not* covered by the bargaining agreement.

It was therefore the conclusion of this judge that the Collective Bargaining Agreement did not bar the applicant from reinstatement and the collection of back wages.

Admittedly, this could result in placing the applicant in a more favored position than a co-employee who may have equal or even more seniority; however, the fact does remain that the applicant was discriminated against, and the defendant employer cannot hide behind a Collective Bargaining Agreement and discriminate with impunity.

In view of said discrimination against the applicant, Sections 789 and 790 of the Collective Bargaining Agreement should be exercised or in the alternative, the applicant should be treated as an employee not covered by the Collective Bargaining Agreement and if need be, transferred to a position other than a structural assembler.

III

RECOMMENDATION

Since the defendant's Petition for Reconsideration is unverified, it should be dismissed as a defective petition.

In the alternative, it is recommended that the Petition for Reconsideration be denied on its merits.

Joel W. Gray

JOEL W. GRAY
Workers' Compensation Judge
WORKERS' COMPENSATION
APPEALS BOARD

Dated at Long Beach, California

Service by mail on: Cantrell, Green,
Pekich & Zaks
Secia & Davidson
Irell & Manella

Dated: JUN 20 1986

By: Hitomi Suzuki

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BRYAN RAYNOR,	)	**CASE NO.**
	)	**81 LB 115046**
Applicant	)	**81 LB 115051**
	)	
vs.	)	**OPINION**
	)	**AND ORDER**
McDONNELL	)	**DENYING**
DOUGLAS	)	**RECONSIDERATION**
CORPORATION	)	
	)	
Defendant	)	
	)	

Defendant, McDonnell Douglas Corporation, seeks reconsideration of the Supplemental Findings and Award (Labor Code Section 132a) which issued May 19, 1986 wherein it was found, inter alia, that defendant did in fact violate Labor Code Section 132a, entitling applicant to reinstatement of his employment as a structural assembler and to reimbursement of lost wages; and, that the collective bargaining agreement did not bar such reinstatement and was not relevant in this instance. Petitioner contends (1) that the workers' compensation judge (WCJ) erred in premising his decision upon the availability to applicant of a structural assembler position outside the bargaining agreement when in fact no such position exists; (2) that the WCJ erred in premising his decision upon applicant's having been a "structural assembler" when a stipulation and the undisputed testimony indicated applicant was never so employed; (3) that the WCJ

erred in ordering applicant "reinstated" into a position for which he is totally unqualified; (4) that the WCJ erred in placing applicant in a better position than he had before the discriminatory act even though similarly situated employees with similar seniority and qualifications were laid off and neither transferred nor recalled; (5) that the WCJ decided the case on an issue that was not properly before him and defendant had no notice or opportunity to present evidence; and (6) that the WCJ erred in ordering applicant transferred to the structural assembler position without there being any evidence in the record regarding when an opening in this classification would have first become available to a non-seniority person.

Based upon the record and for the reasons stated by the WCJ and for the reasons stated herein, we will deny the petition both on the merits and for procedural reasons.

The record reflects that it was previously found by way of the Joint Supplemental Findings and Award dated April 19, 1983 that the defendant employer was in violation of the provisions of Labor Code Section 132a and that the applicant was entitled to reinstatement to his employment and back wages. This decision was affirmed by the Appeals Board on June 29, 1983 when it denied defendant's Petition for Reconsideration and was affirmed by the Court of Appeals, 2nd District, Division 5 on January 5, 1984 when defendant's Petition for Writ of Review was denied.

Thereafter, the matter returned for hearing on the enforcement of the award since the employer refused to reinstate the applicant to his employment and pay back wages. A Findings and Order issued November 14, 1984, wherein it was found that the

collective bargaining agreement barred wages. However, on reconsideration, this finding was rescinded and the case returned to the WCJ for further study of the terms of the collective bargaining agreement. The case came back on for hearing on December 13, 1985 and January 3, 1986 on the following issues:

> "1. Enforcement of the award, to wit, reinstatement to employment and back wages.
>
> 2. Collective bargaining agreement barring such reinstatement and back wages.
>
> 3. Relevancy of collective bargaining agreement regarding Labor Code Section 132a.
>
> 4. Application of collective bargaining agreement barring such reinstatement and back wages." (See Minutes of Hearing, December 13, 1985).

Testimony was taken of the applicant and five witnesses and a Supplemental Findings and Award issued which is the subject of the instant petition.

On the merits, with respect to petitioner's first two and fourth contentions, we note that in the Findings and Award of April 16, 1982, it was found that applicant's occupation was that of a structural assembler. Therefore, the issue of classification is res judicata. Applicant testified at the original hearing that he was classified as a janitor, however, he was performing the work as a structural engineer. This would indicate that applicant was certainly capable of doing that type of work and therefore qualified. Petitioner's third contention also lacks merit. Since petitioner was actually performing the same type of work as a structural engineer, he was not being placed in a position to which he was unqualified, nor was he

being placed in a better position than he had before the discriminatory act, with respect to contention four.

Labor Code Section 132a provides:

> "It is the declared policy of the State that there should not be discrimination against the workers who are injured in the course and scope of their employment."

It further provides that the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the act of the employer. Reinstatement must be made whether or not there is an opening in the job at the time that reinstatement is ordered. Therefore petitioner's sixth contention lacks merit.

For the reasons stated above, the fourth contention also does not have merit. Defendant was not denied its due process rights and an opportunity to be heard on the four issues listed for the hearing of December 1985. As stated above, the issue of classification was res judicata. Additionally, the WCJ's disposition at the end of the hearing was that applicant was given ten days to file Points and Authorities and defendant was given ten days thereafter to respond to those Points and Authorities, with applicant being given another ten days to rebut the response.

Moreover, the collective bargaining agreement mandated placement in an available job within the applicant's capacity and provided for transfer of seniority in the event of permanent disability. Since applicant indicated that he was capable of doing the work of the structural engineer and was qualified, a transfer of seniority was appropriate.

In addition to denying the petition on the merits, procedurally we note that the petition for reconsider-

ation did not comply with Labor Code Sections 5902 and 5903. Labor Code Section 5902 requires that the petition be verified upon oath and the manner required for verified pleading in courts of records. Labor Code Section 5903 provides that a petition for reconsideration can be filed within 20 days after the service of the final decision, order or award. Code of Civil Procedure Section 1013 extends this time by 5 days if service is by mail. In the instant case, the Findings and Award issued May 19, 1986, the unverified petition for reconsideration was filed timely on June 12, 1986, however, the verification was not filed until June 25, 1986 which renders it untimely.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration be, and the same hereby is, DENIED.

WORKERS' COMPENSATION
APPEALS BOARD

I CONCUR.

DATED AND FILED AT
SAN FRANCISCO, CALIFORNIA
AUG 27 1986
SERVICE BY MAIL ON SAID DATE
TO ALL PARTIES LISTED ON THE
OFFICIAL ADDRESS RECORD.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
CLAY ROBBINS, JR., CLERK

DIVISION: 5 DATE: 01/26/87

Irell & Manella
James N. Adler
1800 Ave. of the Stars
Suite 900
Los Angeles, CA 90067

B023144

RE: McDonnell Douglas Corporation,
vs.
W.C.A.B.
Raynor, Brian
2 Civil B023144
Los Angeles No. 81LB115046

THE COURT:

Petition for writ of review is denied.

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 5, No. B023144

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

McDONNELL DOUGLAS CORP., Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD et al., Respondents.

Petition for review DENIED.

Chief Justice

STATUTE

In 1981, when McDonnell Douglas terminated Raynor, California Labor Code § 132a stated in pertinent part:

> It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. (1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and benefits caused by such acts of the employer.

California Labor Code § 132 presently states in pertinent part:

> It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment. (1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file an application for adjudication with the appeals board, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensa-

tion shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

RULE 28.1 LISTING

McDONNELL DOUGLAS CORPORATION'S SUBSIDIARIES AND AFFILIATES

1. AEC Information Services Ltd.
2. Alpha Listing (UK) Ltd.
3. ARC Software Japan, Inc.
4. ARC Yamagiwa Inc.
5. Am Cuideamn Teoranta
6. Applied Research of Cambridge Limited
7. Atlantic Intermountain Express, Inc.
9. Raising CE51-Tymshare Belgium Bactomatic, Limited
10. CEGI-Tymshare GmbH
12. CEGI-Tymshare Nederland B.V.
13. CEGI-Tymshare S.A.
14. CMC Computer Machinery (Proprietary) Limited
15. CMC Leasings Ltd.
16. Coaliquid, Inc.
17. Coaliquid International B.V.
18. Coaliquid International, Inc.
19. Coaliquid International Ltd. N.V.
20. Computer Machinery Company Limited
21. Douglas Development Company-Irvine
22. Douglas Realty Company, Inc.
23. Edinet Limited
24. EDI Systems Limited
27. Hams Express, Inc.
29. Irisn Aerospace Limited
30. Kokusai Tymshare Kabushiki Kaisha
31. MACARV, Inc.
32. MCCAIR Support Services, Inc.
33. McAuto International, Inc.

35. McAuto (UK) Ltd. (name being changed to Metorex Limited and being dissolved)
36. McDonnell Douglas (Australia) Pty Ltd.
37. McDonnell Douglas Astronautics Technical Services GmbH
38. McDonnell Douglas Automation GmbH
39. McDonnell Douglas B.V.
40. McDonnell Douglas Canada, Ltd.
41. McDonnell Douglas China, Inc.
42. McDonnell Douglas China Technical Services Inc.
43. McDonnell Douglas Computer Systems Company, Inc.
45. McDonnell Douglas F-15 Technical Services Company, Inc.
46. McDonnell Douglas Finance Corporation
47. McDonnell Douglas Finance Corporation International N.V.
48. McDonnell Douglas Finance Corporation, Ltd.
49. McDonnell Douglas Foreign Sales Corporation
50. McDonnell Douglas Health Systems Canada, Inc.
51. McDonnell Douglas Helicopter Company
52. McDonnell Douglas Helicopter International, Inc.
53. McDonnell Douglas Helicopter Support Services, Inc.
54. McDonnell Douglas Inco, Inc.
55. McDonnell Douglas Informatica, S.A.
56. McDonnell Douglas Information Systems, A.B.
57. McDonnell Douglas Information Systems Canada, Inc.
58. McDonnell Douglas Information Systems GmbH
59. McDonnell Douglas Information Systems Limited

60. McDonnell Douglas Information Systems Pty, Ltd.
61. McDonnell Douglas Information Systems, S.A. (France)
62. McDonnell Douglas Information Systems, S.A. (Switzerland)
63. McDonnell Douglas Information Systems S.r.l.(MDIS/ITALY)
64. McDonnell Douglas International Sales Corporation
65. McDonnell Douglas Japan, Ltd.
66. McDonnell Korea, Ltd.
67. McDonnell Douglas, Ltd.
68. McDonnell Douglas Overseas Finance Corporation
69. McDonnell Douglas Oversease, Inc.
70. McDonnell Douglas Radio Services Corporation
71. McDonnell Douglas Realty Company
72. McDonnell Douglas Service Company
73. McDonnell Douglas Services, Inc.
74. McDonnell Douglas Spain, Ltd.
75. McDonnell Douglas Support Services, Inc.
76. McDonnell Douglas Thor-Delta Technical Services Company, Inc.
77. McDonnell Douglas Training Systems, Inc.
78. McDonnell Douglas Travel Company
79. McDonnell Douglas Truck Services, Inc.
80. McDonnell Douglas (UK) Ltd.
81. McDonnell Douglas Worldwide, Ltd.
82. MDAC Support Services, Inc.
83. MDC Cypress Properties, Inc.
84. MD Computer Sales, Ltd.
85. MDC Properties, Inc.
86. MDFC Equipment Leasing Corporation
87. MDFC Industrial Finance Limited

88. MDFC Leasing Limited
89. MDFC Loan Corporation
90. MDFC Placement Corporation
91. Microdata Computers (Holdings) Limited
92. Microdata Computers Ltd.
93. Microdata International Corporation
94. Microdata Limited
95. Network Service Co., Ltd.
96. Republic Health Corporation
97. Sanus Corp. Health Systems
98. Sanus Health Plan, Inc.
99. Sustemas Informaticos Microdata, S.A.
100. Sligos, S.A.
101. Standard Memories Caribe Limited
103. Swiss Reprecision Company Limited
104. Taylorix-Tymshare, GmbH
105. Telecheck Services, Inc.
106. Telecheck (U.K.) Limited
107. Telecheck Washington, Inc.
108. TNZ, Inc.
109. Tronics, Inc.
110. Tymcom Kabushiki Kaisha
111. Tymcom Limited (Name changed to Bestpost Limited 10/29/85, and now will be dissolved)
112. Tymnet International, Inc.
113. Tymnet Limited
114. Tymnet (U.K) Limited
115. Tymshare Network Systems Consulting, S.A.
116. Vitek Systems, Inc.
117. Wright Truck Rental, Ltd.
118. York Truck Rental, Inc.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

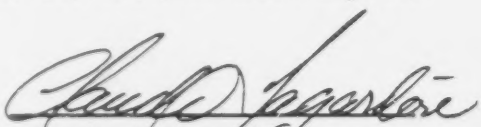
I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on June 23, 1987, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Richard J. Cantrell, Esq.
Cantrell, Green, Pekich & Zaks
401 East Ocean Boulevard
Suite 500
Long Beach, CA 90802
(3 Copies)

Richard W. Younkin, Esq.
Workers' Compensation
Appeals Board
P.O. Box 6759
San Francisco, CA 94101-6759
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 23, 1987, at Los Angeles, California.



Claude A. Lagardère
(Original signed)

No. 87-9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

MCDONNELL DOUGLAS CORPORATION,
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, and BRYAN RAYNOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD J. CANTRELL,
Counsel of Record
a member of
CANTRELL, GREEN, PEKICH
& ZAKS
A Professional Corporation
401 E. Ocean Boulevard
Suite 500
Long Beach, CA 90802
(213) 432-8421
Attorneys for Respondent
Bryan Raynor

July 21, 1987

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

QUESTION PRESENTED

The true question presented by the Petition for Writ of Certiorari is:

Whether a state action arising out of a valid state interest in protecting injured workers from discrimination should be preempted solely because the Petitioner may elect to create a question as to the terms of a collective bargaining agreement in complying with the state order?

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No. 87-9

In the Supreme Court

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Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, and BRYAN RAYNOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice And Associate Justices Of The United States Supreme Court:

Respondent, Bryan Raynor, respectfully submits the following in answer to the Petition for Certiorari in the above entitled matter. Respondent respectfully submits there is no factual or legal basis for the grant of certiorari.

JURISDICATIONAL STATEMENT

The Petitioner allegedly invokes jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). The Petition does not set forth which portion of the said section is applicable. The Petition does not appear to question the validity of California Labor Code Section 132a as being repugnant

to the Constitution, treaties, or laws of the United States. No other portion appears applicable. It is therefore submitted jurisdiction is not properly invoked.

SUMMARY OF THE CASE

The Petitioner, McDonnell Douglas Corporation, has previously been found guilty of discriminating against Respondent, Bryan Raynor, for filing a workers' compensation claim. Such conduct is prohibited by California Labor Code Section 132a. The Petitioner has previously sought and been denied review by the California Supreme Court of that decision.

Petitioner refused to compensate the Respondent Raynor for lost wages and to reinstate him as required by Labor Code Section 132a. Respondent Raynor invoked supplemental enforcement proceedings before the Workers' Compensation Appeals Board. Petitioner then claimed it was not obligated to comply with the prior decision and has raised the provisions of a collective bargaining agreement as a defense against either reinstatement or back wages.

The proceedings in the California Workers' Compensation Appeals Board and appellate courts solely arose out of the provisions of California Labor Code Section 132a. No cause of action was alleged out of the collective bargaining agreement.

Petitioner argues to reinstate Respondent may give rise to a grievance and a subsequent arbitration decision which would be adverse to the Workers' Compensation Appeals Board ruling. This argument has been rejected by the Appeals Board and the appellate courts of the State of California.

Petitioner now seeks certiorari alleging federal labor law preemption.

Respondent respectfully submits there is no showing of Congressional intent to preempt valid state court action to protect a valid state interest in Workers' Compensation.

Petitioner fails to advise the Court the Petition was not only denied on the merits but as procedurally defective. California Labor Code Section 5902 requires a Petition for Reconsideration before the Appeals Board be verified. The Petition was not. The Appeals Board denied the Petition not only on the merits but for the fact it failed to comply with Section 5903 and 5902. 5902 specifies the time limits for filing a verified petition. The Court's attention is directed to page Appendix A-41 of the Petition.

ARGUMENT

THE CAUSE OF ACTION AROSE OUT OF AND RELATES TO A VALID STATE WORKERS' COMPENSATION LAW, NOT A COLLECTIVE BARGAINING AGREEMENT.

The employee's claim of discrimination arose from California Labor Code Section 132(a) and does not require any interpretation of the labor contract. Unlike *Hechler* and *Allis-Chalmers*, an interpretation of the labor contract is not required to determine if a cause of action or remedy exists. *International Brotherhood of Electrical Workers v. Hechler*, 107 S. Ct. 2161 (1987); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The employer's duty to not discriminate is not pursuant to any relationship arising out of the labor contract. The duty arises only

from the relationship between the individual employee, the employer, and Section 132(a).

The employer had the duty without regard to the labor contract. There is no implied obligation arising from the contract necessary to any finding of the employer's duty or liability. The claim's independence from the contract is evident by determining if it could have arisen without a labor contract in effect. Suppose the employee had been injured and there was no labor contract. Would not the employee still have a claim of discrimination with the Workers' Compensation Board? Of course he would, just as millions of non-union employees do in California. There is nothing implied from the labor contract that is necessary for the employee's claim. The statute and claim functions independent of the contract.

The remedy is also independent from the labor contract. The Workers' Compensation Judge (WCJ) correctly held "[T]he Collective Bargaining Agreement does not bar such reinstatement and is not relevant in this instance." Petitioner's Appendix, A27. This refutes the employer's claim that the WCJ interpreted provisions of the contract and that the employee can not be reinstated without violating the contract. In addition, the employer has over 7,500 personnel not covered by the labor contract. Petitioner's Appendix, A19. The employee can be reinstated to that part of the workforce without affecting the employer's contractual relations with the union.

Arbitration is not an issue in this case and the petitioners emphasis on it is unwarranted. Arbitration is for contract disputes and the facts indicate none exists here. No party has alleged a breach of the labor contract. Furthermore, the employee could not have filed a grievance over the discrimination because the claim arose only

from the employer's violation of the Workers' Compensation law.

The employer claims the employer may potentially violate the terms of a collective bargaining agreement if it complies with the Appeals Board Order. The employer argues this could result in a grievance. This could result in a later arbitrator's decision which might find the employer has breached the contract in the manner or method by which it restores Mr. Raynor to employment. This is pure speculation. There is no grievance pending. The employer has shown no facts upon which the Court may speculate a grievance may arise. The Court is asked to speculate and anticipate a potential conflict. It is respectfully submitted that is not the basis for this Court to grant certiorari.

THERE IS NO SHOWING OF CONGRESSIONAL INTENT TO PREEMPT CALIFORNIA LABOR CODE SECTION 132a, WHICH PROSCRIBES DISCRIMINATORY CONDUCT IN WHICH THE STATE HAS A VALID INTEREST IN THAT THE RIGHTS AND OBLIGATIONS THEREIN DO NOT DEPEND ON A COLLECTIVE BARGAINING AGREEMENT.

The court has limited the scope of pre-emption to congressional intent, *Allis-Chalmers v. Lueck,* 471 U.S. 202, 212 (1985) and held that it will sustain a local regulation "unless it conflicts with Federal Law or would frustrate the Federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states." *Allis-Chalmers* quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1963).

California Labor Code Section 132(a) does not conflict with Federal Law. The law declares the state's policy of

protecting injured workers from resulting discrimination and, in the present case, provides the remedies of financial reimbursement and employment reinstatement. These provisions do not regulate "conduct that is actually protected by Federal Law" and so preemption does not follow as a matter of substantive right. *Brown v. Hotel and Restaurant Employees,* 468 U.S. 491, 503 (1984).

In addition, Section 132(a) does not frustrate the Federal Labor scheme. In analyzing congressional intent and the Federal Labor scheme, the court has reasoned "State law which frustrates the effort of Congress to stimulate the smooth functioning of that process [of free and collective bargaining] thus strikes at the very core of Federal Labor policy." *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962).

In the present case, Section 132(a) does not affect the process of free collective bargaining. It protects injured workers from subsequent discrimination whether they are covered by a labor contract or not. Section 132(a) disputes are litigated between the employee, employer, and state; quite independent of the collective bargaining process. Therefore, 132(a) is outside the scope of preemption.

The totality of the circumstances in this case shows that Congress did not seek to occupy the field to the exclusion of the states. Section 132(a) is an integral part of Workers' Compensation Law. Its remedies inherently deal with wages, hours of work, places of work and reinstatements to employment; just as every labor contract does.

If Congress intended to preempt the remedy of reinstatement where there is a labor contract in effect; then Congress must have intended to also preempt all cases

where the workers' compensation remedy overlaps other topics in the labor contract. That conceivably means all cases where the parties dispute wages, hours or occupations.

As preposterous as this sounds, it is what the employer seeks in the present case. In contending that Federal preemption "must be extended to state administrative remedial proceedings" because the state agency's decision is related to the labor contract; Petitioner's petition, p. 8, the employer is, in effect, asking that all workers' compensation disputes at workplaces with a labor contract be federally preempted. Consequently, after an analysis of the totality of the circumstances, in this case, it can not be reasonably discerned that Congress sought to exclude the state from this field of law.

CONCLUSION

It is respectfully submitted certiorari should be denied in that:

1. The Petitioner has failed to establish jurisdiction for the Court to act;

2. The State of California has a valid state interest in protecting its injured workers from discrimination independently of any collective bargaining agreement;

3. The cause of action involved herein does not arise out of the collective bargaining agreement; and

4. The Petitioner failed to timely seek Reconsideration even at the state administrative level.

WHEREFORE, Respondent Bryan Raynor respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

RICHARD J. CANTRELL
A Member of
CANTRELL, GREEN, PEKICH
& ZAKS
A Professional Corporation

APPENDIX A

Statute

California Labor Code, Section 132(a) states, in pertinent part:

Nondiscrimination policy. It is declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.

(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file an application for adjudication with the appeals board, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), altogether with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

Proceedings for increased compensation as provided in paragraph (1), or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board, but these proceedings may not be commenced more than one year from the discriminatory act or date of termination of the employee. The appeals board is vested with full power, authority, and jurisdiction to try and determine finally all the matters specified in this section subject only to judicial review, except the appeals board shall have no jurisdiction to try and determine a misdemeanor charge.

California Labor Code Section 5902 states:

Requirements of petition for reconsideration. The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board. The petition shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof.

California Labor Code Section 5903 states:

Grounds for reconsideration. At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds and no other:

(a) That by the order, decision, or award made and filed by the appeals board or a workers' compensation judge, the appeals board acted without or in excess of its powers.

(b) That the order, decision, or award was procured by fraud.

(c) That the evidence does not justify the findings of fact.

(d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.

(e) That the findings of fact do not support the order, decision, or award.

Nothing contained in this section shall limit the grant or continuing jurisdiction contained in Sections 5803 to 5805, inclusive.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 21, 1987, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "McDonnell Douglas Corporation vs. Workers' Compensation Appeals Board of the State of California, Bryan Raynor" in the United States Supreme Court, October Term 1987, No. 87-9;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

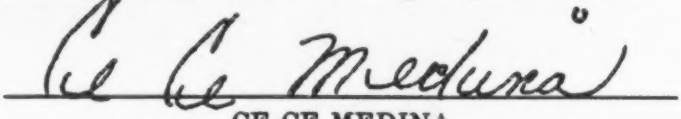
Workers' Compensation Appeals Board
P.O. Box 6759
San Francisco, California 94101-6759

Irell & Manella
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067

All Parties Required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 21, 1987, at Los Angeles, California



CE CE MEDINA